A **HASRAN MOHMED YUSOF (AS ADMINISTRATOR OF THE ESTATE OF ZAKARIA ABDUL RAOF, DECEASED) v. TIAN SIANG ORCHARD SDN BHD**

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
B VARGHESE GEORGE JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: A-02(NCVC)(W)-1809-10-2014]
9 AUGUST 2016

C ***LAND LAW:*** *Agreement – Validity of – Whether valid and binding on plaintiff – Dealings in land – Defendant's right to occupy and use land – Whether land a Malay Reserve Land – Whether transaction with intention to divest ownership of Malay Reserve Land to non-Malay void – Whether trial judge erred in relying on records of witness from official department to conclude on status of land – Whether*
D *there was evidence that land had been duly gazetted as Malay Reserve Land – Malay Reservation Enactment (FMS Cap 142), s. 3 – Whether defendant established equitable right to occupy and use land – Whether plaintiff estopped from denying defendant's right to occupy and use land*

LAND LAW: *Malay reservations – Dealings in land – Transaction with intention*
E *to divest ownership of Malay Reserve Land to non-Malay – Whether void – Whether land a Malay Reserve Land – Whether trial judge erred in relying on records of witness from official department to conclude on status of land – Whether there was evidence that land had been duly gazetted as Malay Reserve Land – Malay Reservation Enactment (FMS Cap 142), s. 3 – Whether defendant established*
F *equitable right to occupy and use land – Whether plaintiff estopped from denying defendant's right to occupy and use land*

The appellant ('the plaintiff') was the current administrator of the estate of one Zakaria Abdul Raof ('ZAR'), the deceased. The action involved the registered 1/4 undivided share interest of ZAR in land held presently under
G five title documents ('the land'). Previous administrators of ZAR estate had entered into an agreement ('1982 agreement') with Ching Sia Tiong ('CST') to dispose of ZAR's interest in the land to CST. The other co-proprietors having interest in the land were also parties to the same agreement. The co-proprietors of the land had, pursuant to the 1982 agreement, allowed CST
H and/or Padang Gajah Sdn Bhd ('PGOSB') to enter upon and take vacant possession of the land. PGOSB had continued to be in occupation and had developed the land into an oil palm plantation without any objection or protest by any of the co-proprietors including the administration of ZAR's estate. PGOSB, describing itself as the beneficiary owner of the land, had
I entered into an agreement with the respondent ('the defendant') ('the 1994 agreement') to sell to the defendant PGOSB's interest in the land. Since 1994, the defendant had occupied and continued with the oil palm cultivation on the land. In 1996 and 2010, there were TNB acquisitions involving certain

parts of the land and the defendant had received the two compensation payments thereto without protest from any of the co-proprietors including the administrators of ZAR's estate. The defendant had also filed a private caveat to protect their interest in the land. The plaintiff in this action asserted that (a) the 1982 agreement was null and void and/or no longer had any legal effect or was binding on the estate; (b) the estate had no knowledge of and in any event had not consented to the sale of the land by PGOSB to the defendant in 1994; (c) all proceeds derived from the land, including the compensation received from TNB, should be accounted for and paid over by the defendant to the estate. The plaintiff's case was premised on the claim that the land had always been a Malay Reserve Land and could not therefore be sold or transferred to CST, being a non-Malay. In furtherance to this contention, the plaintiff relied solely on the endorsement 'Tanah Simpanan Melayu' which was found on all the five Geran Mukim. It was contended that any transaction with intention to divest the ownership of a Malay Reserve Land to a non-Malay was void and in contravention of the Malay Reservation Enactment (FMS Cap 142) 'the Enactment'). The defendant argued, *inter alia*, that the land was never at the time of the 1982 agreement or at any time thereafter a validly gazetted Malay Reserve Land. In its counterclaim, the defendant sought for a declaration that the 1982 agreement was valid and enforceable, and also for consequential orders that there be specific performance of the terms of that agreement by the plaintiff. The High Court Judge held that the land was not at any time a 'Tanah Simpanan Melayu' according to the records of the department of the defendant's witness ('SD3'), the Ketua Pendaftaran Jabatan Ukur dan Pemetaan Perak, and accordingly rejected the plaintiff's contention and proceeded to hold that the land at the time of the execution of the 1982 agreement and also at the time of the 1994 agreement was never a Malay Reserve Land. Hence, the plaintiff appealed against the said decision. The issue revolved around the question whether the trial judge was correct in accepting SD3's evidence as being sufficient to establish the status of the land. It was contended by the plaintiff that this could only have been conclusively confirmed by the Pentadbir Tanah Daerah and this material witness had not been called by the defendant. The plaintiff argued that (i) the presumption of regularity of official acts as provided in s. 114(e) of the Evidence Act 1950 should have been invoked by the court, insofar as the Geran Mukims and what was expressed thereon were being challenged; and (ii) the presumption of adverse inference under s. 114(g) of the Evidence Act 1950 should have been applied by the court upon the failure of the defendant to call the Pentadbir Tanah Daerah as a witness at the trial.

Held (dismissing appeal; affirming decision of High Court)
Per Varghese George JCA delivering the judgment of the court:

(1) The enabling presumptions outlined in the illustrations to s. 114 of the Evidence Act 1950 are rebuttable presumptions of facts leaving it upon the judge to decide (discretionary not mandatory) whether to invoke the

same or not depending on the circumstances of each particular case including the nature of the fact, the existence or absence of which, had to be proved before the court. It only meant that certain facts were eminently reasonable to presume in particular situations. Those presumptions were not an inflexible rule and only to be resorted to if they were strictly necessary to meet the ends of justice. (para 36)

(2) SD3 had given detailed testimony as to the processes involved and the steps to be followed to validly designate any land as a Malay Reserve Land. This was sufficient in itself to discharge the onus of proof placed on the defendant and/or to even rebut any presumption that was open to the court under s. 114(e) of the Evidence Act 1950. The trial judge did not err in wholly relying on the evidence of SD3. Significantly, SD3's testimony that the due processes to validly invest the land with the status of a Malay Reserve Land was not complied with, remained unchallenged or otherwise negated by the plaintiff. (paras 37-40)

(3) The 1982 agreement did not anywhere state that the land was a Malay Reserve Land. Certain co-proprietors of the land from whom CST had contracted to purchase the interest in the land were non-Malay parties; this could not have been the case if the land was indeed a Malay Reserve Land. No evidence was led by the plaintiff to show that the land had at any point or even subsequent to 1982 been duly gazetted as a Tanah Simpanan Melayu, as required by s. 3 of the Enactment. (para 41)

(4) The 'chose in action' or interest in the land vested in CST and/or PGOSB pursuant to the terms of the 1982 agreement was an assignable interest at all times. It was only the non-notification of the execution of the subsequent 1994 agreement by PGOSB with the defendant that led the trial judge to hold that the defendant could not succeed on their claim for an order of specific performance against the plaintiff. Notwithstanding that lack of notice, the fact was established in evidence that the plaintiff knew of and had acknowledged always the defendant's rights to the use and possession of the land since 1994. The direct payment of the TNB compensation to the defendant without any protest by the plaintiff was one such piece of evidence. One other documentary evidence of similar effect was a letter from 'Ladang Abdul Raof' to the defendant forwarding the quit rent notices for the five GM lots of the land to be duly settled with the authorities by the defendant. (paras 44 & 45)

(5) The defendant clearly had established their equitable right to occupy and use the land; the defendant had carried on with the oil palm plantation and had expended their own funds to improve the same. This was further supported and evidenced by the private caveat lodged by the defendant and which remained in respect of the land, without any challenge by ZAR's estate. The plaintiff did not take any proceedings either to evict

nor did they assert any claim for the proceeds or income derived from the land by the defendant. The plaintiff was therefore estopped now from denying the defendant's right to occupy and use the land. Therefore, there was no appealable error on the part of the trial judge which warranted appellate intervention. (paras 46 & 47)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') adalah pentadbir semasa estet Zakaria Abdul Raof ('ZAR'), si mati. Tindakan ini melibatkan kepentingan 1/4 bahagian yang tidak dibahagikan milik ZAR dalam tanah yang dipegang di bawah lima dokumen hak milik ('tanah'). Pentadbir-pentadbir estet ZAR sebelum ini telah memasuki satu perjanjian ('perjanjian 1982') dengan Ching Sia Tiong ('CST') untuk melupuskan kepentingan ZAR dalam tanah kepada CST. Pemilik bersama lain yang turut mempunyai kepentingan dalam tanah itu juga terlibat dalam perjanjian sama. Pemilik bersama tanah telah, menurut perjanjian 1982, membenarkan CST dan/atau Padang Gajah Sdn Bhd ('PGOSB') memasuki dan mengambil milikan kosong atas tanah. PGOSB terus menghuni dan membangunkan tanah itu ke sebuah ladang kelapa sawit tanpa apa-apa bantahan atau protes oleh pemilik bersama termasuk pentadbir estet ZAR. PGOSB, yang menggambarkan dirinya sebagai pemilik benefisiari tanah, memasuki perjanjian dengan responden ('defendan') ('perjanjian 1994') untuk menjual kepentingan PGOSB dalam tanah itu kepada defendan. Sejak 1994, defendan menghuni dan meneruskan penanaman kelapa sawit di atas tanah. Pada tahun 1996 dan 2010, terdapat pengambilalihan oleh TNB yang melibatkan bahagian-bahagian tanah tertentu dan defendan menerima dua bayaran pampasan tanpa protes daripada mana-mana pemilik bersama termasuk pentadbir estet ZAR. Defendan juga telah memfailkan kaveat persendirian untuk melindungi hak mereka atas tanah. Plaintif dalam tindakan ini menegaskan bahawa (i) perjanjian 1982 adalah tidak sah dan terbatal dan/atau tidak lagi mempunyai kesan undang-undang atau mengikat estet; (ii) estet tidak berpengetahuan dan tidak membenarkan penjualan tanah oleh PGOSB kepada defendan pada 1994; (iii) semua hasil yang diperolehi daripada tanah, termasuk pampasan yang diterima oleh TNB, perlu diambil kira dan dibayar oleh defendan kepada estet. Kes plaintif berdasarkan tuntutan bahawa tanah adalah tanah simpanan Melayu dan oleh itu tidak boleh dijual atau dipindah milik ke CST, yang bukan Melayu. Plaintif merujuk pada pengesahan 'Tanah Simpanan Melayu' yang ditemui atas kelima-lima Geran Mukim. Dihujahkan bahawa apa-apa transaksi dengan tujuan melupuskan milikan tanah simpanan Melayu ke orang bukan Melayu terbatal dan melanggar Enakmen Rizab Melayu (Cap 142) ('Enakmen'). Defendan menghujahkan, antara lain, bahawa tanah tidak pernah semasa perjanjian 1982 atau pada bila-bila masa selepas itu diwartakan sebagai Tanah Simpanan Melayu secara sah. Dalam tuntutan balasnya, defendan memohon pengisytiharan bahawa perjanjian 1982 adalah sah dan boleh dikuat kuasa, dan juga memohon perintah berbangkit untuk pelaksanaan spesifik syarat-syarat yang terdapat

dalam perjanjian plaintif. Hakim bicara memutuskan bahawa tanah bukan pada bila-bila masa 'Tanah Simpanan Melayu' menurut rekod jabatan saksi defendan ('SD3'), Ketua Pendaftaran Jabatan Ukur dan Pemetaan Perak, dan menolak hujahan plaintif dan mencapai keputusan bahawa tanah pada masa pelaksanaan perjanjian 1982 dan juga pada masa perjanjian 1994 tidak pernah menjadi Tanah Simpanan Melayu. Oleh itu, plaintif memohon terhadap keputusan tersebut. Isu berkisar soalan sama ada hakim bicara betul dalam menerima keterangan SD3 sebagai mencukupi untuk membuktikan status tanah. Plaintif menghujahkan bahawa ini hanya boleh disahkan oleh Pentadbir Tanah Daerah dan saksi penting ini tidak dipanggil oleh defendan. Plaintif menghujahkan bahawa (i) anggapan keteraturan tindakan rasmi seperti yang diperuntukkan dalam s. 114(e) Akta Keterangan 1950 sepatutnya digunakan oleh mahkamah, setakat Mukim Geran dan apa yang telah tertera padanya dicabar; dan (ii) anggapan inferens bertentangan di bawah s. 114(g) Akta Keterangan 1950 harus diguna pakai oleh mahkamah atas kegagalan defendan memanggil Pentadbir Tanah Daerah sebagai saksi semasa perbicaraan.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Peruntukan-peruntukan membolehkan yang digariskan dalam gambaran s. 114 Akta Keterangan 1950 adalah anggapan fakta yang boleh dipatahkan dan adalah untuk hakim membuat keputusan (budi bicara dan bukan wajib) sama ada untuk menggunakan yang sama atau tidak, bergantung kepada keadaan kes termasuk sifat fakta, kewujudan atau ketiadaannya, yang harus dibuktikan di hadapan mahkamah. Ia bermaksud bahawa hanya fakta tertentu adalah munasabah untuk anggapan dalam keadaan tertentu. Anggapan itu bukan satu peraturan tegar dan hanya akan digunakan jika perlu untuk memenuhi matlamat keadilan.

(2) SD3 telah memberikan bukti terperinci berkenaan proses yang terlibat dan langkah-langkah yang diambil untuk menetapkan dengan sah mana-mana tanah sebagai Tanah Simpanan Melayu. Ini mencukupi dengan sendirinya untuk melepaskan beban pembuktian yang ada pada defendan dan/atau untuk mematahkan anggapan yang terbuka pada mahkamah di bawah s. 114(e) Akta Keterangan 1950. Hakim bicara tidak salah apabila bergantung sepenuhnya pada keterangan SD3. Nyata sekali bukti SD3 bahawa proses wajar untuk menetapkan dengan sah status Tanah Simpanan Melayu atas tanah itu tidak dipatuhi, kekal tidak dicabar atau sebaliknya dinafikan oleh plaintif.

(3) Perjanjian 1982 tidak menyatakan bahawa tanah adalah Tanah Simpanan Melayu. Pemilik bersama tanah yang berurusan dengan CST berkenaan kepentingan tanah adalah bukan Melayu; ini tidak akan berlaku jika tanah adalah Tanah Simpanan Melayu. Tiada keterangan dikemukakan

oleh plaintif bagi menunjukkan tanah pada bila-bila masa atau selepas 1982 telah sewajarnya diwartakan sebagai Tanah Simpanan Melayu, seperti yang dikehendaki oleh s. 3 Enakmen.

(4) 'Hak dalam tindakan' atau kepentingan dalam tanah yang terletak hak pada CST dan/atau PGOSB menurut syarat-syarat perjanjian 1982 adalah kepentingan diserahhakkan pada setiap masa. Tanpa notifikasi pelaksanaan perjanjian 1994 oleh PGOSB dengan defendan yang membawa kepada keputusan hakim bicara bahawa defendan tidak berjaya atas tuntutan untuk perintah pelaksanaan spesifik terhadap plaintif. Walaupun tiada notis, fakta membuktikan bahawa plaintif mengetahui dan sentiasa mengakui hak-hak defendan untuk penggunaan dan milikan tanah sejak 1994. Bayaran terus pampasan TNB kepada defendan tanpa apa-apa protes oleh plaintif adalah satu keterangan. Satu lagi keterangan dokumentar yang membawa kesan yang sama adalah surat daripada 'Ladang Abdul Raof' kepada defendan yang menghantar notis cukai tanah untuk kelima-lima lot GM tanah untuk diselesaikan dengan pihak-pihak berkuasa oleh defendan.

(5) Defendan dengan jelasnya membuktikan hak yang saksama untuk menghuni dan mengguna tanah; defendan meneruskan dengan perladangan kelapa sawit dan membelanjakan dana mereka sendiri untuk mempertingkatkan yang sama. Ini disokong dan dibuktikan oleh kaveat persendirian yang dibuat oleh defendan dan yang kekal berkenaan tanah, tanpa apa-apa bantahan oleh estet ZAR. Plaintif tidak mengambil apa-apa prosiding sama ada untuk mengusir atau menuntut apa-apa tuntutan untuk hasil atau pendapatan yang diperoleh daripada tanah oleh defendan. Plaintif dengan itu diestop daripada menafikan hak defendan untuk menghuni dan mengguna tanah. Oleh itu, tiada kekhilafan berlaku di pihak hakim bicara yang mewajarkan campur tangan rayuan.

Case(s) referred to:

Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor [1995] 3 CLJ 70 HC ***(refd)***

PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(3)
Evidence Act 1950, ss. 101, 102, 114(e), (g)
Malay Reservation Enactment (FMS Cap 142), s. 3
Rules of the Court of Appeal 1994, r. 7(3A)

For the appellant - Paari Perumal & KA Ch'ng; M/s Chai & Partners
For the respondent - Thomas Su Keong Siong; M/s CK Leong & Co

[Editor's note: For the High Court judgment, please see Hasran Mohmed Yusof lwn. Tian Siang Orchard Sdn Bhd [2015] 1 CLJ 810 (affirmed).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Varghese George JCA:

Introduction

[1] The Ipoh High Court after a full trial had on 29 September 2014 dismissed both the appellant/plaintiff's claim and the respondent/defendant's counterclaim in Guaman Sivil No. 22NCVC-142-09-2013. Only the appellant/plaintiff appealed against that decision.

[2] After having heard counsel for the respective parties we had on 14 April 2015 dismissed the appeal. We now set out the grounds for our decision.

[3] The parties will be referred to here as they were at the High Court.

Background

[4] The plaintiff was the current administrator of the estate of Zakaria bin Abdul Raof (ZAR), deceased.

[5] The action involved the registered 1/4 undivided share interest of ZAR in land held presently under five title documents, namely GM 2224, GM 2225, GM 2226, GM 2227 and GM 2228 (previously EMR 2826, EMR 2827, EMR 2828, EMR 2829 and EMR 2830) for Lots 827, 829, 832, 833 and 836, all in the Mukim of Sungei Tinggi, Daerah Larut & Matang, Negeri Perak (hereinafter referred to collectively as 'the land').

[6] Previous administrators of ZAR estate had on 10 May 1982, entered into an agreement (1982 agreement) with Ching Sia Tiong (CST) to dispose of ZAR's interest in the land to CST. The other co-proprietors having interest in the land were also parties to the same agreement to similarly sell all their respective undivided shares in the land to CST.

[7] The total consideration for the overall purchase of the land was stated to be RM441,626. It was not in dispute that a total sum of RM220,813 had been paid to the co-proprietors and, from that sum, the ZAR's estate had received the proportionate portion of that part payment of purchase price as was due to the estate.

[8] The 1982 agreement, *inter alia*, contained the following:

(a) Recital (3)

> (3) The Purchaser is purchasing the property for and on behalf of a company which he intends to incorporate by the name of PADANG GAJAH ORCHARD SDN BHD or by whatever name as shall be approved by the Registrar of Companies (hereinafter referred to as "the Company"), and the Purchaser upon incorporation of the company will cause the company to adopt this Agreement so that upon completion of this Agreement the said property will be transferred directly to the company.

(b) Recital (4)

(4) The Vendors will be applying for and will obtain all necessary consents or orders of the court to approve the sale of the property as provided for in this Agreement.

(c) Clause 2.1(b)

2.1. Payment of balance of purchase price

The balance of purchase price ...

(a) ...

(b) and the final balance of Ringgit Two Hundred and Twenty Thousand, Eight Hundred and Thirteen ($220,813.00) only shall be paid not later than twelve (12) months from the date of this execution of this Agreement or upon the expiry of a 30 days' notice being given by the Vendors to the Purchaser that the necessary consents or orders of the court approving the sale as provided for in this Agreement has been obtained, whichever shall be later.

(d) Clause 7.1

7.1. Court Order

The Vendors do hereby covenant and undertake to apply for and obtain all necessary consents and orders of the court, and do all other things as shall be necessary for obtaining the same, in approving the sale of the said property to the Purchaser as provided for in this Agreement. In the event that the Vendors shall fail to do so, all monies received by the Vendors shall be refunded to the Purchaser free of any interest, whereupon this Agreement shall forthwith terminate and cease to be of any further effect.

(e) Clause 8.1

8.1. Delivery of vacant possession and authority to carry out works

Vacant possession of the said Property shall be delivered by the Vendors to the Purchaser within one (1) calendar month from date of receipt of the sum as mentioned in Clause 1.1. herein. Together with the aforesaid vacant possession, the Vendors shall allow the Purchaser to enter on to the said property with full authority to carry out replanting works and other projects related thereto at the Purchaser's own costs, and all incomes earned or derived from such works or projects and including all subsidies or grants provided by the relevant authorities for such works or projects shall accrue absolutely to the Purchaser. PROVIDED ALWAYS that the authority herein given to the Purchaser to enter on the said property and to carry out works and projects as aforesaid shall terminate and cease forthwith and all incomes and other receivables accruing therefrom shall forthwith cease to be payable to the Purchaser upon the Purchaser's default to complete the purchase as stipulated in

A Clause 2.1 herein, whereupon the Purchaser shall forthwith vacate and deliver up possession of the said property to the Vendors.

[9] Padang Gajah Orchard Sdn Bhd (PGOSB) was incorporated on 15 June 1982. The co-proprietors of the land had, pursuant to cl. 8.1 B (delivery of vacant possession and authority to carry out works) of the 1982 agreement, allowed CST and/or PGOSB to enter upon and take vacant possession of the land. PGOSB had continued to be in occupation and had developed the land into an oil palm plantation without any objection or protest by any of the co-proprietors including the administrators of ZAR's C estate.

[10] PGOSB (describing itself as the 'beneficiary owner' of the land) had then on 1 February 1994 entered into an agreement with the defendant (the 1994 agreement) to sell to the defendant, PGOSB's interest in the land for a consideration stated to be RM443,926. Of this sum, only a part was D paid. It was however provided at cl. 2.1 of the 1994 agreement that the balance of purchase price amounting to RM220,813 '... shall be paid by the purchaser to the registered landowners' (the 'purchaser' referred to the defendant).

[11] Since 1994 the defendant had occupied and continued with the oil E palm cultivation on the land. All annual quit rents levied in respect of the land were paid by the defendant. In 1996, and again in 2010, there were TNB acquisitions involving certain parts of the land and the defendant had received the two compensation payments thereto (amounting to a total of RM478,580) without protest from any of the co-proprietors including the F administrators of ZAR's estate.

[12] The defendant had also on 11 April 2008 filed a private caveat to protect their interest in the land.

[13] The plaintiff in this action commenced in 2013, asserted that:

G (a) the 1982 agreement was null and void and/or no longer had any legal effect or was binding on the estate;

(b) the estate had no knowledge of and in any event had not consented to the sale of the land by PGOSB to the defendant in 1994;

H (c) all proceeds derived from the land, including the compensation received from TNB, should be accounted for and paid over by the defendant to the estate.

[14] The plaintiff's case was premised on the claim that the land had always been a Malay Reserve Land and could not therefore be sold or transferred I to CST, being a non-Malay. In furtherance of this contention the plaintiff relied solely on the endorsement 'TANAH SIMPANAN MELAYU' which was found on all the five Geran Mukim which, as it transpired, had been issued in 1996 in replacement of the EMR documents of title in respect of the land. It was contended that any transaction with intention to divest the

ownership of a Malay Reserve Land to a non-Malay was void and in contravention of the Malay Reservation Enactment (FMS Cap 142) (the Enactment).

[15] It was also the plaintiff's contention that, in any event, that since such portion of the balance of the purchase price due to the estate for it 1/4 share in the land had remained unpaid all this time since 1982, the estate was no longer bound to any contract (if at all existent) by reason of the breach of the terms of the 1982 agreement by CST, PGOSB or any other purchaser or occupier of the land.

[16] The defendant's case however was that the land was never at the time of 1982 agreement or at any time thereafter a validly gazetted Malay Reserve Land. It was contended that there appeared to be an administrative error in the endorsement now found in the replacement Geran Mukim documents of title when the original EMR documents of title in respect of the five lots comprised in the land, did not carry any such restriction in interest or endorsement at all.

[17] It was also the defendant's defence that the balance of the agreed purchase price (or such portion as were due to ZAR's estate) under the 1982 agreement by the express terms of that contract therein was not due for payment as yet. Such sum was only required to be paid before the expiry of a contemplated 30 days' notice to be issued by the co-proprietors that all necessary consents or orders of the court approving the sale had been obtained by the co-proprietors (as vendors). The estate had not given any notice that they had duly obtained such required consent or order of the court (cl. 2.1).

[18] The defendant also maintained that the estate had all along since 1994 been aware and had acknowledged the interest of PGOSB and subsequently that of the defendant, in the land traceable directly to the terms of the 1982 agreement between the administrators of ZAR's estate and CST. Neither had the plaintiff to date applied to remove the caveat entered by the defendant on the land.

[19] In their counterclaim the defendant in the main sought for a declaration that the 1982 agreement was valid and enforceable, and also for consequential orders that there be specific performance of the terms of that agreement by the plaintiff.

High Court

[20] By agreement of the parties only the issue of 'liability' was initially up for determination by the court. The learned trial judge identified the issues that were before the court as follows:

(a) Whether the 1982 agreement was validly made and in force; and

(b) Whether the 1992 agreement was valid, in force and binding on the plaintiff.

[21] As the documents of title (namely, the Geran Mukims) produced in court bore the endorsement 'TANAH SIMPANAN MELAYU', and it was the defendant who was contesting this fact, the learned trial judge took the position that the onus to prove that the land was not a Malay Reserve Land shifted onto the defendant, pursuant to accepted evidentiary principles of law (ss. 101, 102 of the Evidence Act 1950 (EA)).

[22] The learned trial judge analysed the evidence led before the court and accepted the testimony of the defendant's witness, Abdul Aziz bin Sahry (SD3), the Ketua Pendaftaran, Jabatan Ukur and Pemetaaan, Perak that the land was not at any time a 'Tanah Simpanan Melayu' according to the records at this witness's department, notwithstanding that *ex facie* the replacement GMs carried that endorsement. The learned trial judge accordingly rejected the plaintiff's contention and proceeded to hold that the land at the time of the execution of the 1982 agreement and also at the time of the 1994 agreement was never a Malay Reserve Land.

[23] With respect to the 1982 agreement, the court noted that:

(a) the plaintiff did not in their pleadings deny the existence of that agreement;

(b) the terms of the agreement, particularly Recital 3 clearly stated that the land was being purchased by CST for PGOSB and therefore PGOSB as the beneficial owner was entitled to dispose their interest in the land to the defendant;

(c) the terms of the agreement required consents and order of court to be obtained by the co-proprietors of the land (vendors) and since no such consent or order of court had been produced or any notice thereto issued, no obligation to pay ZAR's estate the balance of purchase price had arisen;

(d) clause 7 of the agreement provided an avenue for the agreement to be terminated if the required consents and order of court were not secured by the co-proprietors but this had not been invoked to date; and

(e) as the agreement had not been terminated the contract therein remained valid and still to be completed (that is, the contract remained still executory in nature).

[24] With regard to the 1994 agreement the learned trial judge, whilst noting again that CST in entering into the 1982 agreement was expressly acting for or as a representative of PGOSB (and accordingly PGOSB was rightfully entitled to the benefit of the terms of the 1982 agreement), held that no notice of the subsequent 1994 agreement entered into between PGOSB and the defendant (which was in the nature of an assignment of a 'chose in action' as His Lordship ruled), had however been given to the plaintiff. There was therefore no privity of contract between the plaintiff and the defendant. The defendant could not therefore rely on the 1994 agreement to seek specific performance by the plaintiff of the 1982 agreement.

Enclosure 6(a)

[25] Before we dealt with the appeal proper, we heard and disposed a notis usul filed by the defendant, namely encl. 6(a). This was an application under s. 69(3) of the Courts of Judicature Act 1964 to adduce a fresh piece of evidence, namely a consent judgment that had been entered on 12 December 2014 in Ipoh High Court Originating Summon No. 24NCVC-472-10-2014 (OS 472-10/2014).

[26] OS No. 472-10/2014 had been filed by the defendant on 27 October 2014 after the decision in the current suit under appeal had been delivered (29 September 2014). The defendant in OS No. 472-10/2014 had cited the Pengarah Tanah dan Galian, Perak and the Pendaftar Tanah, Pejabat Daerah dan Tanah Larut Matang dan Selama, Perak, as defendants. OS No. 472-10/2014 applied for an order:

> ... bahawa memorial ataupun indorsmen "Tanah Simpanan Melayu" di atas Suratan-suratan Hak milik untuk tanah yang dipegang di bawah Geran Mukim 2224, Lot No. 827; Geran Mukim No. 2225, Lot No. 829, Geran Mukim No. 2226, Lot No. 832; Geran Mukim No. 2227, Lot No. 833 dan Geran Mukim No. 2228, Lot No. 836 kesemuanya di dalam Mukim Sungai Tinggi, Daerah Larut & Matang, Negeri Perak Darul Ridzuan (hartanah tersebut) hendaklah dibatalkan dan/atau dimansuhkan atas alasan bahawa memorial dan/atau pengindorsan "Tanah Simpanan Melayu" tersebut adalah dibuat dengan cara suatu instrument yang tidak mencukupi atau tak sah.

[27] The consent order entered on 12 December 2014 in OS No. 472-10-2014 was in terms of the order applied for by the defendant.

[28] Enclosure 6(a) was opposed by the plaintiff (appellant) who submitted that the threshold requirement under r. 7(3A) of the Rules of the Court of Appeal 1994 (RCOA) had not been fulfilled. The main contention of the plaintiff was that the Pendaftar Tanah, Daerah Larut Matang and Selama had been listed as a witness to be called by defendant in the suit under appeal but the defendant had closed their case without calling that witness; this evidence sought now to be introduced at the appeal stage was available to the defendant and reasonable diligence would have required it to be produced at the hearing of the suit under appeal.

[29] We did not agree with the plaintiff and proceeded to grant leave to the defendant to introduce the consent order as fresh evidence in this appeal. We were satisfied that both limbs of r. 7(3A) of the RCOA had been satisfied.

[30] In our minds, there existed a valid distinction that had to be drawn between the availability and calling of witnesses on the one hand and the introduction of a subsequently obtained consent order, on the other hand. They were entirely two separate matters.

[31] The consent order in OS No. 472-10-2014 was a new piece of evidence relevant to the subject matter on appeal which had come into existence after and subsequent to the judgment in the appeal before us. Without a doubt, it is related to matters in issue and would have had a determining influence on the outcome of the case at the trial stage and in the appeal before us.

The Appeal

[32] Having heard counsel for the respective parties, it was our considered view there was sufficient evidence before the learned trial judge to support the conclusion reached by the court that the land was not a Malay Reserve Land in 1982, or in 1994 or at the time of the trial.

[33] The issue revolved around the question whether the learned trial judge was correct in accepting SD3's evidence as being sufficient to establish the status of the land, namely that it was not a Malay Reserve Land. The plaintiff's contention was that this could only have been conclusively confirmed by the Pentadbir Tanah Daerah and this material witness had not been called by the defendant.

[34] The plaintiff's argument before us was twofold, namely:

(a) the presumption of regularity of official acts as provided in s. 114, illustration (e) of EA should have been invoked by the court, insofar as the Geran Mukims and what was expressed thereon were being challenged; and

(b) the presumption of adverse inference under s. 114 illustration (g) of EA should have been applied by the court upon the failure of the defendant to call the Pentadbir Tanah Daerah as a witness at the trial.

[35] The material provision of s. 114 of the EA are as follows:

> 114 Court may presume existence of certain fact.
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume –
>
> ...
>
> ...
>
> ...
>
> (e) the judicial and official acts have been regularly performed;
>
> ...

(g) the evidence which could be and is not produced would if produced be unfavourable to the person who withhold it;

...

...

But the court shall also have regard to such facts as the following in considering whether the maxims do or do not apply to the particular case before it:

...

...

[36] It was trite that the enabling presumptions outlined in the illustrations to s. 114 of the EA were rebuttable presumptions of facts leaving it upon the judge to decide (discretionary not mandatory) whether to invoke the same or not depending on the circumstances of each particular case including the nature of the fact, the existence or absence of which had to be proved before the court. It only meant that certain facts were eminently reasonable to presume in particular situations. Those presumptions were not an inflexible rule and, according to authorities, only to be resorted to if they were strictly necessary to meet the ends of justice. (see *Metroplex Development Sdn Bhd v. Mohd Mastana Makaddas & Anor* [1995] 3 CLJ 70; [1995] 2 MLJ 276, HC; *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560, FC)

[37] SD3 gave detailed testimony as to the processes involved and the steps to be followed to validly designate any land as a Malay Reserve Land. This in our considered view was sufficient in itself to discharge the onus of proof placed on the defendant and/or to even rebut any presumption that was open to the court under s. 114 illustration (e) of the EA. The learned trial judge did not therefore err in wholly relying on the evidence of SD3, *albeit*, that he was the Ketua Pendaftaran at the Jabatan Ukur dan Pemetaan Perak.

[38] The material part of the evidence-in-chief of SD3 (Witness Statement Q/A 3, 4, 5 and 6) were as follows:

3. Adakah maklumat hartanah yang dikenali sebagai Geran Mukim No. 2224, Lot No. 827; Geran Mukim No. 2225, Lot No. 829; Geran Mukim No. 2226, Lot No. 832; Geran Mukim No. 2227, Lot No. 833 dan Geran Mukim No. 2228, Lot No. 836 kesemuanya di dalam Mukim Sungai Tinggi, Daerah Larut & Matang, Negeri Perak (selepas ini dirujuk secara kolektif sebagai "hartanah tersebut") ada terkandung di dalam peta-peta tersebut?

J: Kesemua lot-lot yang dinyatakan adalah berada di dalam Mukim Sungai Tinggi tetapi ianya tidak terkandung di dalam CP 52023 dan CP 52024. Pelam Akui sebenar bagi kesemua lot tersebut di atas adalah terkandung di dalam Demarcation Sheet (DM) No. 59 dan 60.

A 4. Sila beritahu kepada Mahkamah Yang Mulia ini tentang prosedur yang melibatkan dan/atau tindakan yang perlu diambil oleh Jabatan Ukur dan Pemetaan dalam suatu proses penukaran status sesuatu kawasan tanah kepada status "Tanah Simpanan Melayu" oleh pihak Berkuasa Negeri?

B J: Dalam satu-satu proses penukaran status "Tanah Simpanan Melayu", Permohonan Ukur (PU) perlulah diterima terlebh dahulu daripada Pejabat Tanah dan Daerah yang berkaitan setelah diluluskan oleh Majlis Mesyuarat Kerajaan (MMK). Jabatan ini hanya perlu menyediakan Pelan Warta yang diluluskan oleh Pengarah Ukur dan Pemetaan berdasarkan kepada pelan PU tersebut bagi tujuan C pewartaan. Draf pewartaan akan disediakan oleh Pentadbir Tanah Daerah berkaitan dan seterusnya dikemukakan kepada Pengarah Tanah dan Galian Perak sebelum dihantar kepada Pejabat Penasihat Undang-Undang Negeri untuk tujuan pewartaan. Jabatan ini akan menyimpan rekod Pelan Warta tersebut bagi tujuan semakan di masa akan datang.

D 5. Daripada rekod di Jabatan Tuan, adakah pihak Jabatan Ukur dan Pemetaan Perak pernah dan/atau telah menerima sebarang pemberitahu dan/atau warta bahawa status kawasan hartanah tersebut telah ditukarkan pada status "Tanah Simpanan Melayu"?

E J: Berdasarkan rekod, Jabatan ini tidak pernah menerima sebarang pemberitahuan kawasan hartanah yang dinyatakan ditukarkan kepada status "Tanah Simpanan Melayu".

6. Adakah ia satu kehendak dan/atau keperluan mandatori untuk Jabatan Ukur dan Pemetaan dimaklumkan oleh Pihak Berkuasa Negeri tentang pewartaan dan/atau perizaban sesuatu kawasan tanah F kepada status "Tanah Simpanan Melayu"?

J: Ia semestinya dimaklumkan kepada Jabatan ini sekiranya Pelan Warta perlu disediakan dan diluluskan oleh Pengarah Ukur dan Pemetaan bagi tujuan membuat pewartaan.

[39] Under cross-examination, the witness said as follows:

G

Peguam: Boleh Encik Abdul Aziz sahkan bahwa mengikut rekod geran tanah ini tanah ini adalah tanah simpanan melayu. Mengikut rekod geran tanah ini.

Saksi: Berdasarkan rekod jabatan ini setelah siasatan kita memang..

H Peguam: No, no. My question is Encik Abdul Aziz, sila lihat geran tanah ini mengikut rekod geran tanah ini adakah tanah ini dikatakan sebagai tanah simpanan melayu?

Saksi: Saya pun tidak boleh jawab sebab ini..

Peguam: Sila lihat muka surat pertama.

I

Saksi: Kalau ikut tulisan itu memang betul lah. Ya.

Peguam: So kamu sahkan mengikut rekod atas geran tanah ini tanah ini adalah tanah simpanan melayu. Betul? A

Saksi: Ya.

Peguam: Dan kamu tadi telah mengesahkan jika ada apa-apa yang perlu dikatakan mengenai geran tanah ini hanya pentadbir tanah yang boleh berbuat demikian. Benar? B

Upon re-examination SD3 however testified firmly that the land was not Tanah Simpanan Melayu based on the research in his department.

Peguam: Dengan izin Yang Arif. Hanya satu soalan semula. Encik Aziz, tadi telah ditunjukkan geran tanah tersebut dan ditanya dan direkod yang ini adalah tanah simpanan melayu. Soalan semula saya adakah di Jabatan Ukur dan Pemetaan encik boleh sahkan atau tidak boleh sahkan perkara ini. C

Saksi: Okay, Yang Arif, berdasarkan rekod jabatan ukur setelah siasatan kita memang sahkan ini bukan tanah simpanan melayu. D

[40] It must be pointed out that whatever seeming concession by SD3 pounced upon by counsel for the plaintiff in argument as being in the plaintiff's favour, related only to what was *ex facie* visible as endorsed on those title documents. Significantly, this witness's testimony that the due processes to validly invest the land with the status of a Malay Reserve Land was not complied with, remained unchallenged or otherwise negated by the plaintiff. E

[41] We also noted the following, namely:

(a) the 1982 agreement (admitted in its entirety by the plaintiff) did not anywhere state that the land was a Malay Reserve Land; F

(b) certain of the other co-proprietors of the land from whom CST had contracted to purchase the interest in the land) were non-Malay parties insofar as the EMR and now the GM records showed; this could not have been the case if the land was indeed a Malay Reserve Land; and G

(c) no evidence was led by the plaintiff to show that the land had at any point or even subsequent to 1982 been duly gazetted as a Tanah Simpanan Melayu, as required by s. 3 of the Enactment.

[42] The learned trial judge's finding based on the material before the court was now vindicated further by the terms of the consent judgment of 12 December 2014 in OS No. 472-10/2014 where the relevant land authorities have confirmed and acknowledged that the endorsement/memorial found on the GMs, namely, 'Tanah Simpanan Melayu', had been effected without sufficient instrument or otherwise validly in law and this endorsement of a restriction in interest would be accordingly expunged from the records. The Pengarah Tanah dan Galian Perak and the Pendaftar Tanah Daerah were defendants in OS No. 472-10-2014. H I

[43] The next issue was to as the possession or use of the land by the defendant. It was undeniable that by the terms of the 1982 agreement CST and/or PGOSB could enter upon the land and exploit it, notwithstanding that the balance of purchase price had not been fully settled. (See cl. 8.1 read with cl. 1.1 set out above). What need to be highlighted was the fact that in the 1982 agreement there was no express prohibition or restriction in passing that interest or possession in the land to any other. It was also not disputed that certain of the envisaged consent and relevant order(s) from the court had not been obtained by the concerned co-proprietors of the land, including ZAR's estate, and this was the reason why the intended completion and perfection of the formal transfer of the whole of the land to CST or PGOSB had been prevented to be effected in law.

[44] As rightfully noted by the learned trial judge the 'chose in action' or interest in the land vested in CST and/or PGOSB pursuant to the terms of the 1982 agreement was an assignable interest at all time. In the particular context of the facts in this case, it was only the non-notification of the execution of the subsequent 1994 agreement by PGOSB with the defendant however that led the learned trial judge to hold that the defendant could not succeed on their claim for an order or specific performance against the plaintiff.

[45] Notwithstanding that lack of notice, the fact was established in evidence that the plaintiff knew of and had acknowledged always the defendant's rights to the use and possession of the land since 1994. The direct payment of the TNB compensation to the defendant without any protest by the plaintiff was one such piece of evidence. One other documentary evidence of similar effect was a letter dated 15 April 1999 from 'Ladang Abdul Raof' to the defendant forwarding the quit rent notices for the five GM lots of the land to be duly settled with the authorities by the defendant.

[46] The defendant clearly had established their equitable right to occupy and use the land; the defendant had carried on with the oil palm plantation and had expended their own funds to improve the same. This was further supported and evidenced by the private caveat lodged by the defendant and which remained in respect of the land, without any challenge by ZAR's estate. The plaintiff did not take any proceedings either to evict and nor did they assert any claim for the proceeds or income derived from the land by the defendant from the time of the 1994 (1994 agreement) or even after 1999 (when plaintiff handed the quit rent notices to be paid by the defendant). The plaintiff was therefore estopped now from denying the defendant's right to occupy and use the land.

[47] Understandably the plaintiff was left with only one ground to invalidate the 1982 agreement (or the subsequent vesting of rights over the land in the defendant), namely, the contention that the intended original sale transaction involved a transfer of a Malay Reserve Land to a non-Malay

interest. As shown above this was rejected by the learned trial judge, and rightly so in our view, as discussed and elaborated above by us. We therefore did not find any appealable error on the part of the learned trial judge which warranted our appellate intervention.

[48] The decision of the learned trial judge was not plainly wrong on the entirety of the evidence before the court or on the specific issue as regards the actual status of the land, namely, that it was not a Malay Reserve Land. We therefore unanimously dismissed the appeal and affirmed the decision of the High Court.

[49] We further ordered a sum of RM15,000 as costs to the defendant (respondent).